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No. 94-1356

In the
Supreme Court of the United States
October Term, 1994

ROBERT GABLE, HARVEY SPIES, JOHN FOLEY, and EUGENE FOREMAN, on behalf of themselves and as representatives of a class of persons similarly situated,

Petitioners,

v.

SWEETHEART CUP COMPANY, INC., SWEETHEART HOLDINGS INC., et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

MOTION AND BRIEF *AMICI CURIAE* OF GENERAL MOTORS SALARIED RETIREES IN SUPPORT OF RESPONDENTS

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MOTION OF GENERAL MOTORS SALARIED RETIREES FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

Through their counsel, the salaried retirees of General Motors Corporation who are members of the certified and uncertified plaintiff classes in Sprague v. General Motors Corp., No. 94-1896 et al. (6th Cir.) (appeal pending), respectfully move for leave to file a brief amici curiae in support of respondents.

In support of this motion, the following is shown:

1. The GM salaried retirees are litigants in the largest case involving the issue of vesting of health care benefits in retirement under ERISA. That case is now pending on cross-appeals in the Sixth Circuit, GM having prevailed in the district court against the uncertified class of approximately 34,000 "general" salaried retirees, and the class of approximately 50,000 "early" retirees having prevailed against GM.

2. The GM salaried retirees seek to file a brief amici curiae because of the obvious similarity and subject matter between Gable and Sprague, and because of the substantial impact on the interests of the GM salaried retirees that review of the Gable case by this Court might have.

3. Although the sympathies of the General Motor salaried retirees lie with the Gable plaintiffs and although the GM salaried retirees believe that the Gable case was wrongly decided on several grounds, they seek leave to file a brief in support of respondents. The GM salaried retirees submit that the Gable case is an inappropriate vehicle for a broad review of the contract principles that govern on the issue of vesting of retiree health care benefits in ERISA cases.

4. Counsel for petitioners has consented to the filing of an amici curiae brief by the GM salaried retirees. Counsel for respondents has not consented to the filing of a brief amici curiae by the GM salaried retirees.

Respectfully Submitted,

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Dated: March 14, 1995

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BRIEF *AMICI CURIAE* OF GENERAL MOTORS SALARIED RETIREES IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI CURIAE

The salaried retirees of General Motors Corporation are litigants in the largest case involving the issue of vesting of health care benefits in retirement under ERISA. The case, Sprague v. General Motors Corp., is pending on cross-appeals in the United States Court of Appeals for the Sixth Circuit, No. 94-1896 et al.

A class of approximately 50,000 "early" salaried retirees of GM prevailed in the district court on their ERISA claims that GM, as part of early retirement programs in the 1970s and 1980s, entered into individual bilateral contracts with them promising health care benefits for life at no cost to the retiree or surviving spouse. Alternatively, these claims were upheld as individual modifications to the ERISA plan. Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994). The early salaried retirees also

prevailed on their estoppel claims under ERISA for the same benefits. Sprague v. General Motors Corp., 857 F. Supp. 1182 (E.D. Mich. 1994).

An uncertified class of approximately 34,000 "general" salaried retirees of GM (including those who took normal retirement at age 65 and those who took disability retirement) lost on summary judgment in the district court on the ground that GM unambiguously had reserved the right in plan documents to modify or terminate health care benefits in retirement. Sprague v. General Motors Corp., 768 F. Supp. 605 (E.D. Mich. 1991). The district court also rejected the estoppel claims of the general retirees. Sprague, 857 F. Supp. at 1188-89.

The keen interest of the GM salaried retirees in the Gable proceedings is obvious because of the subject matter, but also because in the appeals pending in Sprague in the Sixth Circuit GM places principal reliance on the Fourth Circuit's decision in Gable. The Gable decision in many respects is erroneous, and in some respects represents a view of the law shared by no other court of appeals. Nonetheless, as explained below, the GM salaried retirees submit that the petition for certiorari here is a faulty vehicle for the review of broad legal principles for vesting of retiree health care benefits under ERISA. Although the sympathies of the GM salaried retirees are entirely with the Gable retirees, they oppose the grant of the petition.

REASONS FOR OPPOSING THE WRIT

There are many things wrong with the Fourth Circuit's decision in Gable, which on the whole reads as if ERISA were passed primarily "to ensure predictability as to employers' future liabilities" (Pet. at 11a) instead of to protect the interests of participants and beneficiaries to benefits under ERISA plans. But, despite faulty analysis in the Fourth Circuit's decision, the petition for a writ of certiorari should not be granted. As to the precise holding of the court of appeals, there is no serious conflict among the circuits that should command this Court's review at this time.

The GM salaried retirees agree strongly with the Gable petitioners that it is inappropriate to require a clear and express "waiver" by the employer in the plan language itself in order for retiree health care benefits to vest under ERISA, because such a rule would supersede the contract principles that govern where a plan is ambiguous on the vesting question (Pet. at 17-18). The precise holding of Gable, however, is that the master insurance policy was the governing plan document and that it contained an unambiguous reservation of right to amend or terminate ("may be amended or discontinued at any time") (Pet. at 4a, 8a). There was no plan document or summary plan description (SPD) that made reference to lifetime benefits. The "Schedule II" documents did refer to lifetime benefits at company expense (Pet. at 4a), but these were determined by the court to be "informal communications" and "extrinsic evidence" that did not need to be considered in light of the lack of ambiguity in the plan itself (Pet. at 10a).

The real point of the petition is to have the Court conduct a general review of the contract principles that should apply to vesting of ERISA welfare benefits. As unpalatable as the result in Gable is to the GM salaried retirees, they submit that the holding in Gable is broadly consistent with the contract principle in ERISA cases that the court need not refer to extrinsic evidence if the plan itself is unambiguous. Whether any other court trying that issue on the Gable record would come to the same conclusion is open to question, but there is no fundamental disagreement on the isolated legal principle that a governing plan document containing an unambiguous reservation of a right to amend and containing no promise of lifetime benefits does not, by itself, give rise to further inquiry.

The petition further seeks to engage the Court in the various rules of construction and interpretational aids that the lower courts have used in construing ambiguous ERISA welfare plans. Again, although the courts are not in perfect array on these points, they are in basic accord on the contract principle that ambiguities in plan documents require resort to extrinsic evidence to determine contractual intent. The petition itself concedes as much by citing to cases in the various circuits, including the Fourth Circuit, that

employ these principles (Pet. at 17-19). Furthermore, the Gable case is an inappropriate vehicle to review the nuances of the extrinsic evidence rules, because the case turned on the determination that there was no ambiguity in the underlying plan document requiring resort to extrinsic evidence.

Petitioners' second issue does not afford a basis for the grant of a writ of certiorari. Petitioners essentially argue that the Schedule II documents that the Fourth Circuit found to be informal communications and non-plan documents should be elevated to the status of SPDs. To be sure, the principle that an SPD promising lifetime benefits should govern over an arguable conflict with the plan itself is an important ERISA principle and one that figures prominently in the dispute between the GM salaried retirees and GM. But the lower court here found that the Schedule IIs were not SPDs. ERISA cases of this type are by their nature very fact-specific, and the determination concerning the Schedule IIs here, whether erroneous or not as a factfinding matter, does not present an issue of compelling legal conflict among the circuits warranting review by this Court.

One of the most troublesome aspects of the Fourth Circuit's opinion in Gable is its endorsement of the notion that health care benefits can be changed after retirement as long as a statement reserving the right to make the change is announced before the change (Pet. at 12a-13a). This radical rule of divestiture appears to be unique to the Fourth Circuit. See Pierce v. Security Trust Life Ins. Co., 979 F.2d 23 (4th Cir. 1992) (1984 SPD determined rights of those retired before that date). Other courts to address the issue recognize that the focal point for determining if health care benefits vest in retirement is the state of affairs at the time of retirement, not afterwards. See, e.g., In re White Farm Equipment Co., 788 F.2d 1186, 1190-93 (6th Cir. 1986) (addressing question of vesting "at retirement"); Jensen v. SIPCO, Inc., 38 F.3d 945, 951-52 (8th Cir. 1994).

As offensive as the Fourth Circuit's retroactive divestiture rule is to the general principles of vesting of welfare benefits under ERISA, it does not afford a basis for the grant of the petition. The

discussion in Gable is contained in the portion of the decision dealing with the sufficiency of notice of plan changes under 29 U.S.C. § 1022 (Pet. at 12a-13a). Although the opinion refers to the "binding effect of the 1986 SPDs" (Pet. at 14a), the vesting issue in Gable was decided on the basis of the underlying plan document which the court found to be unambiguous, without reference to SPDs. Moreover, the conflict between Gable and Jensen on the impact of post-retirement SPDs does not appear to be encompassed in the second question presented by the petition, which relates to what types of extrinsic evidence should be considered to determine whether employers have promised to continue health care benefits in retirement.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully Submitted,

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